

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MICHELLE L. ENGLAND**

Claimant

VS.

**MOST HEALTH CARE SYSTEMS, INC.**

Respondent

Docket No. 1,049,168

AND

**NEW JERSEY MANUFACTURERS INS.  
CO. and HARTFORD INSURANCE CO.**

Insurance Carriers

AND

**KANSAS WORKERS COMPENSATION  
FUND**

**ORDER**

**STATEMENT OF THE CASE**

The Kansas Workers Compensation Fund (Fund) requested review of the July 13, 2010, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders. George H. Pearson, of Topeka, Kansas, appeared for claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for the Fund.<sup>1</sup> Larry G. Karns, of Topeka, Kansas, appeared for New Jersey Manufacturers Insurance Company (New Jersey Manufacturers). The employer, Most Health Care Systems, Inc., (hereinafter respondent) did not appear.

The Administrative Law Judge (ALJ) found that claimant is entitled to medical care. Further, the ALJ found the employer did not have workers compensation insurance coverage that extended to claimant, that it was unclear whether the employer is financially able to pay, and that attempts have been made by claimant and her attorney to secure

---

<sup>1</sup> The transcript of the July 13, 2010, Preliminary Hearing erroneously shows Mr. Crowley as appearing as counsel for the respondent at page 1.

benefits from the employer. Therefore, the ALJ found that the Fund is liable for claimant's medical care.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 13, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

### ISSUES

The Fund asserts the ALJ exceeded her authority in conducting the preliminary hearing when there was no showing that the respondent had been properly notified of the hearing. The Fund contends that under K.S.A. 44-532a, its liability is derivative of the respondent. And because respondent was not given an opportunity to respond or present evidence at the preliminary hearing, its right to due process was violated. Also, the Fund argues that its ability to enforce a right of recovery against respondent is contingent upon an underlying order imposing liability upon the respondent. The Fund further contends that because claimant delayed so long after being released from treatment by the authorized health care provider before formally seeking additional medical treatment, she should be required to proceed against the respondent. The Fund does not dispute the ALJ's finding that respondent is uninsured for this claim. Nevertheless, the Fund argues that before liability can be imposed upon it, there must be evidence that the employer is financially unable to pay benefits.

Claimant states that the attorney for respondent's insurance carrier, New Jersey Manufacturers, was given notice and its attorney was present at the preliminary hearing. Claimant argues that New Jersey Manufacturers' notice is imputed to respondent. Claimant further argues that *Helms*<sup>2</sup> states that a claimant does not have a burden to prove the employer is unable to pay benefits before the Fund is liable.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over the issues in this appeal of a preliminary hearing order?

(2) Did the ALJ exceed her authority in ordering benefits to claimant without respondent having been given notice of and/or being present at the preliminary hearing?

(3) Did the ALJ exceed her authority in imposing liability against the Fund?

---

<sup>2</sup> *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

**FINDINGS OF FACT AND PRINCIPLES OF LAW**

The preliminary hearing held on July 13, 2010, was attended by the attorney representing the Fund and the attorney representing New Jersey Manufacturers, as well as by claimant and her attorney. Respondent, Most Health Care Systems, Inc., did not appear. There was a discussion as to whether respondent had been given notice of the preliminary hearing and whether it is still in business.

Claimant testified that she was employed by respondent in Kansas and was injured on January 2, 2008, in Rock Springs, Wyoming. Chuck Kemeny, respondent's owner, was called, and claimant was taken to the emergency room, where she was treated and released. Respondent faxed her a ticket to return home to Kansas. Claimant saw a chiropractor from February 6, 2008, to April 14, 2008. On February 7, 2008, claimant faxed Mr. Kemeny a written claim asking for her workers compensation papers so her doctor could be paid. Respondent paid the emergency room bill and the chiropractor bills without turning them in to its workers compensation insurance. Claimant filed an Application for Hearing on January 22, 2010, and an amended Application for Hearing on May 20, 2010.

At the preliminary hearing, the attorney representing New Jersey Manufacturers specifically stated that he was not entering an appearance on behalf of respondent because New Jersey Manufacturers' policy with respondent only covered employees hired by and working for respondent in New Jersey.

Claimant's attorney stated that Hartford Insurance Company assumed coverage for respondent in June 2008, after the date of accident. And because New Jersey Manufacturers did not extend coverage to claimant, respondent was uninsured in regard to claimant's injury. Further, claimant's attorney stated that after "a gazillion"<sup>3</sup> attempts, he was able to speak with respondent's owner, Chuck Kemeny, one time, and that Mr. Kemeny refused to talk to him. Claimant's attorney said he has been unable to locate Mr. Kemeny and, therefore, under the statute<sup>4</sup>, the Fund is liable to pay the ordered benefits to claimant.

The attorney for the Fund stated that if respondent either has insurance or is financially able to pay, the Fund is not liable. The Fund did not dispute the ALJ's finding that respondent's insurance policy with New Jersey Manufacturers does not extend to this claim. However, the Fund argued that there was no evidence in the record that respondent is financially unable to pay the benefits that could be ordered. The Fund disputed claimant's argument that the respondent cannot be located and made to pay. Further, the

---

<sup>3</sup> P.H. Trans. at 43.

<sup>4</sup> K.S.A. 44-532a(a).

attorney for the Fund argued that the Fund was not intended to cover employers where the employer is an ongoing and financially sound entity in another state. The Fund contends claimant must pursue other means of payment before making a claim against it.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can only review allegations that an ALJ exceeded his or her jurisdiction.

K.S.A. 2009 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

The Fund contends that the ALJ exceeded her jurisdiction by conducting a hearing and entering an order for benefits "when the respondent, Most Health Services, Inc., [sic] was not properly notified of the preliminary hearing pursuant to K.S.A. 44-534a."<sup>5</sup>

K.A.R. 51-3-5a(c) states: "In no case shall an application for preliminary hearing be entertained by the administrative law judge when written notice has not been given to the adverse party pursuant to K.S.A. 44-534a."

K.S.A. 44-534a states in part:

(a)(1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

(2) . . . [N]o preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.

K.S.A. 2009 Supp. 44-523(a) states:

The director, administrative law judge or board shall not be bound by technical rules of procedure, **but shall give the parties reasonable opportunity**

---

<sup>5</sup> Kansas Workers Compensation Fund Application for Review (filed July 26, 2010) at 2.

**to be heard and to present evidence**, insure the employee and the employer an expeditious hearing and act reasonably without partiality. (Emphasis added.)

K.S.A. 44-534(a) states:

Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. The application shall be in the form prescribed by the rules and regulations of the director and shall set forth the substantial and material facts in relation to the claim. Whenever an application is filed under this section, the matter shall be assigned to an administrative law judge. The director shall forthwith mail a certified copy of the application to the adverse party. **The administrative law judge shall proceed, upon due and reasonable notice to the parties, which shall not be less than 20 days, to hear all evidence in relation thereto and to make findings concerning the amount of compensation, if any due to the worker.** [Emphasis added.]

In *Johnson*,<sup>6</sup> the Kansas Supreme Court stated:

To satisfy due process, notice must be reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of an action and to afford the parties an opportunity to present any objections.

In *Collins*,<sup>7</sup> the Kansas Supreme Court stated: "The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case."

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.<sup>8</sup> The Kansas Supreme Court has recognized in numerous cases that the right to cross-examine witnesses

---

<sup>6</sup> *Johnson v. Brooks Plumbing, LLC*, 281 Kan. 1212, Syl. ¶ 4, 135 P.3d 1203 (2006).

<sup>7</sup> *Collins v. Kansas Milling Co.*, 207 Kan. 617, Syl. ¶ 2, 485 P.2d 1343 (1971).

<sup>8</sup> *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 784, 473 P.2d 72 (1970).

testifying at administrative hearings of a quasi-judicial character is an important requirement of due process.<sup>9</sup>

In *Adams*<sup>10</sup>, the Kansas Supreme Court stated:

In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

'An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . . .'

The requirements of an administrative hearing of a judicial or quasi-judicial character are phrased in this language in 2 Am. Jur. 2d, Administrative Law, § 412, p. 222:

'. . . A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing has been denied, the administrative action is void. . . .'

Claimant filed her Application for Preliminary Hearing on May 25, 2010. Notice of that Application was sent by the Division of Workers Compensation to the respondent, Most Health Care Systems, Inc., at 501 Preston Ave., Voorhees, NJ, 08043-1105. It provided:

An application was filed with the director's office on May 25, 2010 regarding the above claim. A time and place for the hearing will be established when a party makes a request for a setting to the Administrative Law Judge.<sup>11</sup>

---

<sup>9</sup> *Wulfkuhle v. Kansas Dept. of Revenue*, 234 Kan. 241, 246, 671 P.2d 547 (1983).

<sup>10</sup> *Adams v. Marshall*, 212 Kan. 595, 601-02, 512 P.2d 365 (1973).

<sup>11</sup> SR-#4, Notice of Hearing, mailed May 26, 2010.

A Notice of Hearing was filed by claimant on June 11, 2010. The certificate of service showed copies were mailed to Mr. Matthew S. Crowley, Mr. Larry G. Karns and Ms. Michelle England, with a certified copy sent to Ms. Kelly Stoker, Claim Adjuster, Hartford Insurance Company, P.O. Box 14471, Lexington, KY, 40512.

Because respondent was not provided with notice of the hearing, the Judge was without jurisdiction to proceed with the preliminary hearing.

**ORDER**

**WHEREFORE**, the Order of Administrative Law Judge Rebecca Sanders dated July 13, 2010, is set aside and held for naught.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2010.

\_\_\_\_\_  
HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant  
Matthew S. Crowley, Attorney for the Kansas Workers Compensation Fund  
Larry G. Karns, Attorney for Insurance Carrier New Jersey Manufacturers Ins. Co.  
Hartford Insurance Company, P.O. Box 14471, Lexington, KY, 40512  
Most Health Care Systems, Inc., 501 Preston Ave., Voorhees, NJ, 08043-1105  
Rebecca Sanders, Administrative Law Judge